

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the matter of)
)
Promotion of Competitive Networks)
in Local Telecommunications Markets)
)
Wireless Communications Association International,)
Inc. Petition for Rulemaking to Amend Section 1.4000)
of the Commission's Rules to Preempt Restrictions on)
Subscriber Premises Reception or Transmission)
Antennas Designed To Provide Fixed Wireless)
Services)
)
Cellular Telecommunications Industry Association)
Petition for Rule Making and Amendment of the)
Commission's Rules to Preempt State and Local)
Imposition of Discriminatory And/Or Excessive Taxes)
and Assessments)
)
Implementation of the Local Competition Provisions)
in the Telecommunications Act of 1996)

WT Docket No. 99-217

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OFFICE OF THE SECRETARY

CC Docket No. 96-98

COMMENTS OF WINSTAR COMMUNICATIONS, INC.

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COMMENTS OF WINSTAR COMMUNICATIONS, INC.

WinStar Communications, Inc. ("WinStar"), by its attorneys, hereby submits these

Comments in the above-captioned proceeding.¹

¹ In re Promotion of Competitive Networks in Local Telecommunications Markets; Wireless Communications Association International, Inc. Petition for Rulemaking to Amend Section 1.4000 of the Commission's Rules to Preempt Restrictions on Subscriber Premises Reception or Transmission Antennas Designed to Provide Fixed Wireless Services; Cellular Telecommunications Industry Association Petition for Rule Making and Amendment of the Commission's Rules to Preempt State and Local Imposition of Discriminatory And/Or Excessive Taxes and Assessments; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Notice of Proposed Rulemaking and Notice of Inquiry in WT Docket No. 99-217, and Third Further Notice of Proposed Rulemaking in CC Docket No. 96-98 (rel. July 7, 1999) ("Notice").

I. INTRODUCTION AND SUMMARY.

WinStar is a nationwide competitive fixed wireless carrier with FCC licenses in a number of bands, including the 28/31 GHz ("LMDS") and 38.6-40.0 GHz ("38 GHz") bands. WinStar provides over 15,000 small- and medium-sized business customers with broadband communications services. Such services include local and long distance, data, voice and video services, as well as high speed Internet and information services. WinStar currently operates in 31 domestic markets, including Atlanta, Baltimore, Boston, Chicago, Dallas, Detroit, Houston, Los Angeles, Minneapolis, New York City, San Diego, San Francisco, Seattle, and Washington, D.C. WinStar plans to expand into 29 additional domestic markets by the end of 2000 and 50 international markets by the end of 2004.

WinStar applauds the Commission's enormous effort in the Notice. For consumers and facilities-based carriers, the issue of nondiscriminatory access to tenants in multi-tenant environments ("MTEs") is crucial. The timely implementation of facilities-based networks is the only solution for meeting the promise of the Telecommunications Act of 1996 ("1996 Act") -- bringing real competitive choice for less expensive broadband services in the local exchange. This issue is so critical that the Subcommittee on Telecommunications, Trade, and Consumer Protection of the U.S. House of Representatives conducted a hearing on this very issue on May 13, 1999.²

² Access to Buildings and Facilities by Telecommunications Providers: Hearing Before the Subcommittee on Telecommunications, Trade, and Consumer Protection of the Committee on Commerce in the U.S. House of Representatives, 106th Cong. (1999) (hereinafter, "Hearing"), attached hereto as Exhibit A.

Fixed wireless carriers, like WinStar, are facilities-based carriers that must install their facilities on rooftops and within buildings to serve tenants in MTEs. WinStar is proud to be the single most successful entity in obtaining building access rights, having obtained access to approximately 5,500 buildings to date, 700 in the last quarter. However, there are over 750,000 MTE office buildings and over one million residential MTEs in this nation.³ As of 1990, approximately 28 percent of the U.S. population resided in MTEs.⁴ WinStar's experience has been that it typically takes nine months to two years to negotiate access to a building. Absent aggressive and immediate relief, it will take decades, not years, to bring widespread competition for broadband services to the country's MTE consumers.

Despite the fact that competitive choice in MTEs actually increases the value of MTE property, many consumers in MTEs are denied competitive choice because MTE owners and managers, whether by action or by inaction, prohibit competitive local exchange carrier ("CLEC") access to their tenants or impose such unreasonable conditions or demand such high rates for access that providing competitive telecommunications service to their buildings is rendered uneconomic. Tenants in these buildings usually have no recourse except to move. Moving, however, is usually not an option for small and medium-sized businesses. They are typically locked-in to long-term leases and/or are not able to incur the expenses of moving to obtain competitive telecommunications services. The result is that fixed wireless carriers are not able to

³ Id. at 24 (Testimony of William J. Rouhana, Jr., Chairman and CEO, WinStar Communications, Inc.).

⁴ Notice, at ¶ 29.

serve a significant portion of U.S. consumers,⁵ and their ability to build out their facilities-based networks is hampered.

The Chief of the FCC's Wireless Telecommunications Bureau recently stated that:

[T]he most substantial benefits to consumers will be achieved through facilities-based competition. Only facilities-based competitors can avoid reliance on bottleneck local network facilities. Only facilities-based competition can fully unleash competing providers' abilities and incentives to pursue publicly beneficial innovation.⁶

Indeed, the Commission acknowledged in the Notice, "the fullest benefits of competition, including the widespread availability of advanced and innovative services at reasonable prices, cannot be achieved unless the incumbent carriers are, to the extent feasible, subject to competition in all sectors of their markets."⁷ Moreover, if competitors can only reach a subset of consumers, "it is unlikely that competition will grow to the point where it will effectively eliminate the incumbent LECs' market power."⁸

Fixed wireless technology unburdened by discriminatory building access obstacles will provide the facilities-based competition to which both Congress and the Commission are committed, that the 1996 Act mandates, and that this proceeding is intended to implement. Indeed, fixed wireless technology possesses inherent advantages because it does not require

⁵ "If a significant portion of these housing units and businesses is not accessible to competing providers, that fact could seriously detract from local competition in general and from the availability of competitive services to 'all Americans'." Id.

⁶ Hearing, at 8 (Testimony of Thomas J. Sugrue, Chief, Wireless Telecommunications Bureau, Federal Communications Commission).

⁷ Notice, at ¶ 6.

⁸ Id. at ¶ 24.

carriers "to construct new, costly wireline networks" to compete with incumbents.⁹ "[W]ireless service providers may be among those with the greatest potential quickly and efficiently to offer widespread competitive facilities-based services to end users."¹⁰ Moreover, facilities-based competition has proven economically superior to both resale and unbundled network element ("UNE") approaches. Unlike resale, which perpetuates reliance on the incumbent local exchange carrier ("ILEC"), a facilities-based approach permits carriers to fully pursue competitive advantages. And despite the extraordinary resources dedicated at the State and federal levels, a UNE-based approach, while existing as a legal entitlement, has proven viable in only the most marginal sense, as evidenced by the small number of UNEs actually provisioned by ILECs throughout the country.¹¹ Thus, the Commission must aggressively employ its full authority to ensure that facilities-based carriers willing and able to deploy their networks are not forestalled from doing so at the building entrance.

For fixed wireless carriers to succeed, they must have reasonable access to rooftops, intra-building wire, riser conduit (both horizontal and vertical), telephone closets, and Network Interface Devices ("NIDs") in MTEs. While a handful of States have provided for MTE access, the majority have not. Moreover, where national MTE owners and managers' properties extend over several States, no State is able to address unreasonable behavior in a comprehensive fashion.

⁹ Id. at ¶ 19. Indeed, "fixed wireless systems can often be constructed in less time, at lower cost, and in smaller increments than wireline networks, especially in areas where the costs of wireline links may be especially high" due to the need to lay wire under streets in business districts. Id.

¹⁰ Hearing, at 9 (Sugrue Testimony).

¹¹ Industry Analysis Division, Common Carrier Bureau, FCC Report, "Trends in Telephone Service," at 9-1 (Feb. 1999).

It is essential as a practical matter and appropriate as a legal matter for the Commission to provide a solution, and the Commission must mandate nondiscriminatory access to MTEs. Consistent with a nondiscriminatory access requirement, once an MTE owner or manager grants access to one telecommunications provider, the MTE owner or manager also must permit competitive telecommunications providers access to the MTE at nondiscriminatory rates, terms, and conditions. In determining rates that are nondiscriminatory and reasonable, the Commission need only look as far as the rates that are currently paid by the ILEC for access to the MTE, which in virtually all cases is nothing. Moreover, exclusive agreements with MTE owners and managers should be prohibited, as exclusivity contravenes the competitive choice that the 1996 Act requires.

Opponents of a federal rule mandating nondiscriminatory access claim that the Commission lacks authority to impose such a requirement. However, as demonstrated in these Comments, the Commission has ample jurisdiction to provide a national, constitutional solution to the obstacles fixed wireless competitors face. In addition to its substantive jurisdiction under Titles I, II, and III of the Act, the Commission also has in personam jurisdiction over MTE owners and managers due to their control over "instrumentalities" of interstate and foreign wire communications. In addition, imposition of a nondiscriminatory MTE access requirement is reasonably ancillary to accomplish several provisions of the 1996 Act, including Sections 224, 706, and 207.

Opponents of nondiscriminatory MTE access also assert that such a requirement would impose an unconstitutional "takings" on property owners. These assertions are legally incorrect. First, because a nondiscriminatory access requirement would only apply once a building owner has permitted the first telecommunications provider (i.e., the ILEC) to access his building, neither

a per se nor a regulatory taking would occur. Building owners and other opponents of open access have simply misconstrued the import of cases concerning takings, foremost of which is Loretto v. Teleprompter Manhattan CATV Corporation.¹² Even if a nondiscriminatory access requirement were erroneously held to constitute a taking, it would not be unconstitutional because building owners would receive just compensation.

There are other measures discussed in greater detail below that the Commission should take to ensure nondiscriminatory access to MTEs. For example, the full implementation of Section 224 will permit competitors to use the rights-of-way of utilities on public or private property. In addition, the Commission should revise its rules in Part 68 and establish that the demarcation point should be at the minimum point of entry ("MPOE") for all MTEs and establish that ILECs must provide intra-building wire as a UNE. The Commission should also grant the outstanding Joint Petition for Reconsideration of the Commission's Second Report and Order in the over-the-air reception devices ("OTARD") proceeding.¹³ Finally, the Commission should modify Section 1.4000 of its rules to include all fixed wireless devices.

II. THE SUCCESS OF THE 1996 ACT IS DEPENDENT UPON REASONABLE ACCESS TO ROOFTOPS, RISER CONDUIT, INTRA-BUILDING WIRE, NIDS, AND TELECOMMUNICATIONS CLOSETS BY FACILITIES-BASED CARRIERS.

As a wireless telecommunications carrier, WinStar is dependent on access to rooftops, risers, and intra-building wire in order to deliver its facilities-based services to residents and

¹² 485 U.S. 419 (1982). See discussion infra, at Section IV.C.1.

¹³ Petition for Reconsideration of Personal Communications Industry Association, Teligent, Inc., Association for Local Telecommunications Services, WinStar Communications, Inc., and NextLink Communications, Inc., CS Docket No. 96-83 (filed Jan. 22, 1999), attached hereto as Exhibit B.

tenants of MTEs.¹⁴ WinStar's local broadband network consists of hub sites that are connected to the buildings in which WinStar's customers are located using 38 GHz, 28/31 GHz, and other portions of the radio spectrum. In these Comments, WinStar is focused on gaining access to customer sites in its local broadband network, not hub sites, which tend to present more complex issues. Ultimately, WinStar will connect its local broadband networks via a national end-to-end fiber network, creating a fully facilities-based network that can operate as a true alternative to the incumbents' networks.¹⁵ Access to its customers is WinStar's first priority. Thus, WinStar's request for access in these Comments is first and foremost a request for access to its customers.

Using its Wireless FiberSM service, WinStar is able to deliver high quality voice and data transmissions which meet or exceed telephone industry standards and are fundamentally equivalent in quality to the transmissions produced by fiber optic facilities.¹⁶ In order to serve consumers in MTEs, WinStar typically places antennas on MTE rooftops to receive and transmit wireless traffic.¹⁷ Unlike the larger antenna systems deployed by cellular and PCS providers,

¹⁴ See Hearing on the Third Anniversary of the Telecom Act: A Competition and Antitrust Review Before the Subcommittee on Antitrust, Business Rights, and Competition of the Committee on the Judiciary in the U.S. Senate, 106th Cong. (1999) (Statement of William E. Kennard, Chairman, Federal Communications Commission) ("There is a simple truth: before we can have local competition, new entrants must be able to deploy their competitive network facilities and reach prospective customers on roughly the same basis as the incumbents.").

¹⁵ See, e.g., "WinStar Links East Coast Long-Distance Facilities," Communications Today (Aug. 7, 1998)(WinStar obtained intracity fiber rings and intercity fiber optic capacity to connect its present and planned hub sites and central offices.).

¹⁶ WinStar's Wireless FiberSM service can provide fiber-quality transmission at speeds more than 350 times faster than ISDN, the fastest service currently in general use on legacy networks. Exhibit C provides the answers to the most frequently asked questions about WinStar's system.

¹⁷ WinStar was one of the first carriers to implement such an approach. See Dan O'Shea, "The Wireless Local Access Pioneer Copes With a Quickly Competitive Market,"

WinStar's antennas are small and unobtrusive and only require a small portion of space on a rooftop.¹⁸ In fact, WinStar's antennas are roughly the size of a medium pizza (12 to 24 inches in diameter) and are placed on four foot poles.¹⁹ In many cases, WinStar's antennas are not even visible from the ground. Despite their small size, these antennas are capable of receiving and transmitting large amounts of traffic at speeds up to and including 155 mbps. Fixed wireless antennas are designed to serve tenants in the building on which they are placed; the antennas do not serve surrounding areas like cellular and PCS antennas.²⁰ Consequently, WinStar's Wireless FiberSM service directly benefits the tenants in the building by providing them competitive telecommunications choice.

From the rooftop antenna, WinStar usually carries its wireless traffic through the MTE by a single coaxial cable to WinStar's indoor electronics cabinet, which is typically the size of a small refrigerator or hotel mini bar.²¹ This device transforms the wireless signal into a wireline signal. From the electronics cabinet, traffic is carried to the Network Interface Device ("NID"). Connection to the customer's telephone system is accomplished from the NID through the building to the customer's connect point.²² Installation is quick and easy; it requires no underground construction or digging up of street and sidewalks.

Telephony 55, 56 (Jan. 25, 1999)(WinStar "collected 28 and 38 GHz wireless spectrum licenses all across the country" and "[s]tarted talking about wireless local access, wireless backup applications . . . a few years ago . . .").

¹⁸ See Exhibit D (photograph of installation of WinStar antenna).

¹⁹ See Exhibit E (photograph of antenna).

²⁰ See Exhibit F (diagram of typical rooftop antenna).

²¹ See Exhibit E (photograph of electronics cabinet).

²² See Exhibit G (depiction of fixed wireless technology versus landline technology).

As a facilities-based carrier, WinStar is able to build a highly efficient network to provide state-of-the-art telecommunications services. In addition, WinStar is not subject to economic inefficiencies often associated with ILEC service because it does not need to lay fiber throughout a service area. Currently, WinStar is "primarily focused on the business community" ²³ However, it is a matter of simple business and economics that WinStar will be able to service residential customers once it builds out its network. ²⁴ As WinStar's Chairman and CEO William J. Rouhana, Jr. has recognized, if ". . . it takes [WinStar] decades to get to the commercial marketplace, we can't go to the residential marketplace . . . because the economics don't allow us to do it." ²⁵ Thus, gaining access to business customers by competitive carriers like WinStar is crucial to the timely development of residential competition.

By initiating this proceeding, the Commission has recognized that many fixed wireless providers have found that access to inside wiring, riser conduit, and rooftops are not being made available on nondiscriminatory and reasonable terms. This causes fixed wireless providers to continue to be reliant on the ILEC's network to reach their customers and wholly circumvents the purpose of the 1996 Act -- to bring real facilities-based competition to consumers in order to encourage the provision of less expensive, superior services in the local exchange. ²⁶ The Commission must reverse this trend by guaranteeing competitive telecommunications providers nondiscriminatory and reasonable access to customers in MTEs.

²³ Hearing, at 82 (Rouhana Testimony).

²⁴ Id.

²⁵ Id.

²⁶ See Paul Farhi, "Telephone Market Probes Planned: FCC, Senate Ask Why Competition is on Hold," Wash. Post at C11 (July 16, 1997).

Resale or relying on unbundled network elements, in the long run, does not provide a reliable, economically attractive model for truly competitive telephone service. A resale strategy, for example, offers only limited choice to customers because the rates, quality of service, and technological innovation remain entirely dependent on the ILECs.²⁷ Nor have most competitors found the discounts to be large enough to operate at a profit on a resale basis. For this reason, resale has proven to be a suboptimal competitive strategy for many companies that have tried it. For example, AT&T and MCI have abandoned their resale approach.²⁸ Others have tried the resale approach and found it to be an uneconomic proposition.²⁹

Nor has a UNE approach proven optimal. While a UNE approach may render CLECs less reliant on the ILECs, because the CLEC will typically construct some of its own facilities, it places a heavy burden on the CLEC to repeatedly, quickly, and flawlessly integrate pieces of the existing incumbent's network with pieces of its own competitive network. Aside from these technical and logistical difficulties, a UNE approach has led to difficult legal problems in clarifying

²⁷ See Hearing on the Third Anniversary of the Telecom Act: A Competition and Antitrust Review Before the Subcommittee on Antitrust, Business Rights, and Competition of the Committee on the Judiciary in the U.S. Senate, 106th Cong. (1999) (Testimony of Joel I. Klein, Assistant Attorney General, Antitrust Division, U.S. Department of Justice) (stating that because of the limitations of a resale approach "[i]t is . . . highly unlikely to be a sufficient engine by itself for bringing the range of competitive benefits to mass-market consumers that the Telecom Act intended").

²⁸ See "AT&T Targets Local Service, Administrative Costs and Perks in Cost Cutting," Communications Daily (Dec. 22, 1997); "MCI Says It Will Scrap Resale Plans in Favor of Facilities-Based Competition," Communications Today (Jan. 23, 1998). But see "State and Local Notes," Warren's Cable Regulation Monitor (April 26, 1999) ("AT&T plans to offer local residential service in N.Y. this year by leasing unbundled network elements from Bell Atlantic (BA), departure from total service resale that interexchange carrier (IXC) abandoned in 1997.").

²⁹ See, e.g., "USN Communications Inc.: CoreComm to Buy Assets; Firm Files for Chapter 11," Wall St. J. at B18 (Feb. 22, 1999).

and interpreting the 1996 Act's mandates concerning UNEs.³⁰ Moreover, as demonstrated in the Common Carrier Bureau's Industry Analysis Division's recent report "Trends in Telephone Service," an unimpressive number of UNEs have been provisioned by the ILECs to competitors.³¹ The Industry Analysis Division report states that "resold ILEC lines outnumbered UNE loops by a factor of approximately 10 to 1 at mid-year 1998."³² "Percentages of large ILEC lines provided as UNE loops by state ranged from 0% to 1%. In 12 States, no large ILEC reported providing any UNE loops to CLECs."³³ Hence, only true facilities-based competitive entry will wrest control from the ILECs and offer an alternative to the existing local network.

Nonetheless, the proposals outlined in these Comments support an FCC approach that would allow competitive facilities-based carriers to use several distribution techniques, including a UNE approach, to reach consumers in MTEs. For instance, a CLEC could rely on Section 224 and request access from utilities through riser conduit and rooftop rights-of-way to serve consumers located in an MTE, or alternatively, it could negotiate nondiscriminatory access rights with an MTE owner to wire the building itself. By implementing the proposals outlined in these Comments, the Commission will promote the ability of competitors to use the most efficient and effective means to provide service to consumers in MTEs.

³⁰ See, e.g., AT&T Corp. v. Iowa Utilities Bd., 142 L.Ed.2d 834, 525 U.S. 366 (1999).

³¹ Industry Analysis Division, Common Carrier Bureau, FCC Report, "Trends in Telephone Service," at 9-1 (Feb. 1999). Of the total lines reported, only 0.2% were provisioned as UNEs. See id. Table 9.4.

³² Id. at 9-3.

³³ Id. (emphasis added).

III. WINSTAR HAS FACED MANY OBSTACLES TO OBTAINING MTE ACCESS. STATE INTERVENTION AND NATURAL MARKET FORCES HAVE NOT PROVIDED THE NECESSARY SOLUTIONS; THUS, COMMISSION ACTION IS JUSTIFIED AND NECESSARY.

Since 1994, WinStar has successfully negotiated access to approximately 5,500 MTEs by engaging in good faith negotiations with owners and managers of those MTEs. WinStar is the industry leader in providing fixed wireless services to consumers in MTEs. However, WinStar has encountered numerous MTE owners and managers that have, through action or inaction, effectively denied access altogether or that have demanded unreasonable rates or conditions for such access. This occurs despite the fact that the Building Owners and Managers Association's ("BOMA") Ten Commandments for MTE owners state that building owners shall not discriminate among telecommunications service providers.³⁴ Nevertheless, many MTE owners discriminate against CLECs every day by not allowing access to their MTEs, or by allowing such access only on economically unreasonable terms -- terms that are not imposed upon any other utility that traditionally has enjoyed building access privileges.

Whether a building owner overtly denies access or does so through inaction, the inability to enter the building is the chief impediment WinStar encounters when trying to extend its networks rapidly and to provide a second communications pathway to millions of end users.

WinStar has found it necessary to create a "WinStar for Buildings" division, which exists solely to obtain building access rights. WinStar for Buildings has more than doubled in size over the last year and now employs 169 people.

³⁴ See Wired For Profit, Building Owners and Managers Association (BOMA) International, "Ten Commandments," attached hereto as Exhibit H.

There are approximately 750,000 commercial MTE office buildings in the U.S.³⁵ By the end of next year, WinStar will have in place a network that is expected to cover at least 50,000 of these buildings. That number is expected to triple over time. It typically takes nine months to two years for WinStar to negotiate access rights with each MTE owner and/or manager. Even if WinStar is able to negotiate access to 2500 buildings per year (a tremendous access rate for the industry), it would take WinStar approximately 20 years just to obtain access to all the buildings and customers that its networks are designed to reach by the end of 2000. This is a travesty, especially when WinStar could build out its networks and reach consumers more quickly and efficiently if there was a nondiscriminatory requirement imposed upon MTE owners and managers. As stated by Mr. Rouhana during the May 13, 1999, hearing before the Subcommittee, "We [WinStar] went into business to be big, to serve as many people as we possibly can. The impediment to getting there fast is this building access issue."³⁶

MTE owners and managers raise an insurmountable entry barrier for WinStar and similarly situated CLECs when they refuse access requests or impose such unreasonable rates or conditions that the provision of competitive telecommunications services to their buildings is not practicable. The Commission must act to ensure that CLECs have sufficient access to MTEs at reasonable rates, terms, and conditions. As Congressman Markey recognized during the May 13, 1999, hearing on building access, MTE tenants are "captive" to the MTE owner.³⁷ The higher the fee charged by the MTE owner to the telecommunications provider for access, the higher the

³⁵ Hearing, at 23 (Rouhana Testimony).

³⁶ Id. at 83.

³⁷ Id. at 81.

telecommunications provider's services will need to be priced to cover these costs.³⁸ If these costs are too high, entry may not be economical and consumers will lose.

Moreover, in denying access to competitive telecommunications providers such as WinStar, these MTE owners and managers ignore the fact that these carriers will add significant value to their MTEs. Competitive carriers will upgrade MTE infrastructure at no cost to the building owner to permit the tenants of the MTE access to state-of-the-art broadband capability. Moreover, competitive carriers such as WinStar will provide other related services free of charge to building tenants. In WinStar's case, these services include installation of touch screen, fully automated "Information Kiosks" that provide visitors and tenants to the MTE with useful information concerning MTE tenants, community events, and news.³⁹ Moreover, WinStar offers substantial benefits to building owners and tenants through complimentary seminars regarding telecommunications technology and other educational opportunities.⁴⁰

The U.S. Government recently encouraged the Government of Japan to "[e]stablish rules that facilitate access to privately owned buildings, particularly multi-dwelling units, to ensure that cable TV and new telecommunications competitors can reach the same customers as the

³⁸ Id. (Statement of Representative Edward J. Markey).

³⁹ See Exhibit I.

⁴⁰ For example, WinStar co-sponsors through its "WinStar for Buildings" division with "Buildings Magazine," a seminar for building owners, managers, commercial brokers, and leasing agents, called "It's About Time: Telecom Made Simple." This seminar provides, among other things, information about telecommunications services, including the Internet, high-speed data, and video conferencing in commercial buildings, tips for assessing landlord/tenant needs, and tips for evaluating building communications infrastructure. To date, WinStar has offered this seminar in 15 different cities across the nation.

incumbent carrier."⁴¹ WinStar simply asks that its own government do the same for the citizens of this country.

A. MTE Owners Have Either Restricted Access Or Made Unreasonable Demands So That Providing Service To An MTE Is Rendered Uneconomic.

In the development of its business, WinStar has approached thousands of building owners and managers to gain access to their property and provide service to their tenants. The vast majority of building owners have ultimately agreed to give WinStar access to their buildings on commercially reasonable terms after lengthy negotiations. However, many building owners or managers have rejected outright WinStar's requests for access. Other have completely ignored WinStar's requests. This has occurred even when one or more tenants in the building have signed up for WinStar's service. A nondiscriminatory access provision would require these uncooperative building owners to allow access to WinStar on a nondiscriminatory basis if they provide access to at least one other telecommunications carrier. Thus, a nondiscriminatory access provision would promote telecommunications competition by making alternative providers available to consumers who do not currently have choice of another provider in their MTEs.

In addition, WinStar has encountered unreasonable conditions and demands when negotiating access to MTEs. Pursuant to the Commission's request, WinStar provides the following examples of the barriers it has faced when negotiating access to MTEs:⁴²

⁴¹ See "Submission by the Government of the United States to the Government of Japan Regarding Deregulation, Competition Policy, and Transparency and Other Government Practices in Japan," at 10 (dated Oct. 7, 1998)("For example, the GOJ should consider setting rules on demarcation points for telecommunications carriers to access buildings and prohibiting owners of multi-dwelling units from denying a tenant access to any telecommunications or cable TV service.").

⁴² Notice, at ¶ 31.

- A landlord restriction proposed in a lease to a tenant providing that the tenant "agrees not to obtain any telecommunications services within the Building from vendors other than those so selected by Landlord."⁴³
- A request from a building owner for \$50,000 upon signing of an access contract, in addition to \$1,200 per month for building access.
- A request from a building owner that WinStar pay \$51,000 per month for access to a portion of the roof for a hub, plus market rent for interior space. This one hub would cost WinStar \$612,000 per year for the rooftop rights alone.
- A request from a building owner with approximately 37 buildings for \$50,000 per year per building for access.
- A request from a building owner that WinStar pay \$1000 per 100,000 square feet in a building simply for the right to serve tenants. For one building alone, the right to access and serve tenants would cost WinStar \$9000 per month. Moreover, this charge did not include payments to a separate management company for access to the rooftops and risers at these locations.
- One building owner refused access because the local ILEC was an anchor tenant in the building, and the owner did not want to "aggravate" the tenant.
- One building owner has an exclusive contract with another communications company that has effectively prohibited

⁴³ A copy of the proposed lease provision is attached hereto as Exhibit J.

WinStar from serving an entire business district because the property owner owns or manages almost all of the MTEs in that area.

- Another building owner has rejected WinStar's request for access to its buildings, thereby preventing WinStar from serving prospective customers in eight MTEs in a city.

B. MTE Owners Have Monopoly Control Over Access To Their Individual Buildings, And The Market Does Not Provide A Remedy.

MTE owners and managers have bottleneck control over access to consumers located in their MTEs. MTE owners and managers have the incentive and ability to leverage this market power to extract monopoly rents from competitive providers seeking access. As demonstrated above, WinStar has faced a number of MTE owners who are only willing to allow a competitor into their buildings at a very high price. Unfortunately, the market does not remedy this problem. Tenants who desire a competitive alternative, typically small and medium-sized commercial tenants, are frequently locked into long-term leases and do not have the means to influence inflexible MTE owners and managers.⁴⁴ The financial penalty for breaking long-term leases and the substantial expenses of moving prevent these tenants from relocating to MTEs that do allow competitive access. Hence, the market has been unable to adjust fully to the fact of competitive choice among telecommunications carriers. Instead of the 1996 Act improving opportunities for consumers, certain landlords see the 1996 Act as an opportunity to capitalize on their monopoly positions.

⁴⁴ Indeed, courts have recognized that the "lock-in" effect impairs natural market adjustments. See, e.g., Eastman Kodak Co. v. Image Technical Services, 504 U.S. 451, 474-476 (1992).

C. A Few States Have Successfully Addressed MTE Access Issues; However, In Many States, Parochial MTE Interests Have Blocked Solutions.

Some States already have provided the necessary solutions to MTE access for competitors.⁴⁵ As the Notice recognizes, Connecticut and Texas both have statutes requiring landlords to permit telecommunications carriers to install their facilities to provide service to tenants therein.⁴⁶ In addition, the Ohio Public Utilities Commission held that landlords could not forbid or unreasonably restrict any tenant from receiving telecommunications services from any provider of the tenant's choice.⁴⁷ It mandated that "no person owning, leasing, controlling, or managing a multi-tenant building shall forbid or unreasonably restrict any occupant, tenant, lessee, or such building from receiving telecommunications services from any provider of its choice, which is duly certified by this Commission."⁴⁸ In Nebraska, too, the Public Service Commission has mandated building access in residential buildings.⁴⁹ Finally, in California, the Public Utilities

⁴⁵ NARUC, too, passed a resolution expressing the need for nondiscriminatory telecommunications carrier access to MTEs and urging regulatory commissions to adopt rules to address that need. See Resolution Regarding Nondiscriminatory Access to Buildings for Telecommunications Carriers, NARUC 1998 Summer Meeting, Seattle, Washington, attached as Exhibit K.

⁴⁶ See Connecticut General Statutes, Section 16-2471. See also Texas Public Utility Regulatory Act §§ 54.259 and 54.260, implemented by Texas Public Utility Commission Project No. 18000.

⁴⁷ Commission's Investigation Into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, Supplemental Finding and Order, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sept. 29, 1994).

⁴⁸ Commission's Investigation Into the Detariffing of the Installation and Maintenance of Simple and Complex Inside Wire, Case No. 86-927-TP-COI, Supplemental Finding and Order, 1994 Ohio PUC LEXIS 778 at *20-21 (Ohio PUC Sept. 29, 1994).

⁴⁹ In the Matter of the Commission, on its Own Motion, to Determine Appropriate Policy Regarding Access to Residents of Multiple Dwelling Units (MDUs) in Nebraska by Competitive Local Exchange Telecommunications Providers, Application No. C-1878/PI-23, Order Establishing Statewide Policy for MDU Access, slip op. at 4 (Neb. PSC, March 2, 1999)(requiring the ILEC to permit the demarcation point to be established at the

Commission has rules designed to promote competitive carrier nondiscriminatory access to tenants in MTEs.⁵⁰ However, that leaves 45 States without MTE access remedies.

Many States have recognized the need for nondiscriminatory telecommunications carrier access to MTEs; however, in part because of opposition by real estate interests, the incumbent carriers, and others who benefit from exclusive arrangements with building owners, these States have been unable to complete their efforts with approved legislation. For example, in at least three States, California, Virginia, and Louisiana, legislation addressing access issues has been derailed before reaching a vote, in part because of opposition by real estate interests and incumbents.⁵¹ Indeed, even where MTE owners and competitive telecommunications providers agree on a consensus position, it can be very difficult to achieve State action. For example in Florida, the real estate industry and the telecommunications industry compromised on an MTE access bill; however, the bill was never permitted to come to the Florida Senate floor for a vote, and subsequently died.⁵²

MPOE upon request of a CLEC and prohibiting exclusive access or marketing arrangements between a telecommunications carrier and a building owner).

⁵⁰ Order Instituting Rulemaking on the Commission's own Motion Into Competition for Local Exchange Service, R. 95-04-043; I. 95-04-044, Decision 98-10-058, slip op. at 99-100 (Cal. PUC Oct. 28, 1998)(requiring that incumbents with vacant space in existing entrance facilities into commercial buildings make space available to competitors up to the MPOE and prohibiting exclusive access contracts with MTE owners).

⁵¹ See, e.g., Greg Lucas, "Phone Companies' Access to Offices Challenged; [California] State Senate Puts Bill in Slow Lane," San Francisco Chronicle at A13 (July 26, 1999), attached hereto as Exhibit L.

⁵² Martin Dyckman, "Conflict of Interest? No Problem," St. Petersburg Times (April 28, 1999), attached hereto as Exhibit M.

D. Commission Action Is Required To Remedy The Problem.

A national, federal solution to the building access problem is essential. It would be very difficult and time-consuming for competitors to rely upon intervention from all 50 States. Moreover, piecemeal State intervention cannot solve all MTE access issues because no State is able to comprehensively address unreasonable behavior by national MTE owners and managers that have property extending over several States. Also, individual States cannot address the fact that some national property owners and managers may leverage their position and penalize carriers that have exercised their rights under State building access laws by blocking those carriers' access to properties in other States where no such rights exist.⁵³

Consumers seeking alternative telecommunications carriers should not be required to relocate in order to have telecommunications competition. The financial penalty for breaking a long-term lease and the substantial expenses of moving render this solution impractical. Moreover, tenants should not be expected to incur these costs to have competitive choice for telecommunications services. Indeed, these impediments are very similar to another barrier consumers faced when switching local exchange carriers. Before the 1996 Act, consumers choosing to switch carriers also had to switch telephone numbers. This is an expensive undertaking, especially for businesses. It certainly was an inconvenience to consumers desiring competitive choice. However, it is not nearly as expensive or inconvenient as requiring consumers to physically relocate to gain competitive choice. Congress believed that the

⁵³ See Hearing, at 77 ("[O]ur experience has been that where State Acts exist and we attempt to use [them to gain access] and we are dealing with a national landlord, they can sometime[s] take it out on us in another State without similar kinds of rights.")(Rouhana Testimony).

consumer's inability to retain his or her telephone number was an insurmountable impediment to local competition. Congress determined that consumers should not have to choose between their telephone number and competition, and that meaningful competition required number portability.⁵⁴ Likewise, consumers should not have to choose between the benefits of competition and maintaining their present physical locations. To truly promote the goals of the 1996 Act, it is necessary and appropriate for the Commission to implement rules requiring nondiscriminatory access to MTEs because the market has failed to provide reasonable alternatives.⁵⁵

WinStar faces significant and formidable barriers to accessing MTEs. While a few States have provided the necessary tools to assist facilities-based carriers, like WinStar, to reach consumers in MTEs, these tools may only be used in those States, and in some instances, they are not effective against national MTE owners and managers. Hence, it is critical that the Commission exercise its authority to implement national rules by which carriers may achieve the right to access MTEs.⁵⁶

⁵⁴ See, e.g., H.R. Rep. No. 104-204, pt. 1, at 72 (1995)("The ability to change service providers is only meaningful if a customer can retain his or her local telephone number.").

⁵⁵ See, e.g., "Spur Competition," The Times-Union (April 28, 1999)(supporting legislation in Florida that would open MTEs to nondiscriminatory access by competitive telecommunications companies), attached hereto as Exhibit N; "Let Tenants Shop for Phone Service," St. Petersburg Times (March 29, 1999)(same), attached hereto as Exhibit O.

⁵⁶ In those States where the access requirements are consistent with the Commission's imposed requirements, the State requirements may govern.

IV. THE COMMISSION MUST IMPOSE A NONDISCRIMINATORY ACCESS REQUIREMENT FOR MTEs.

A. A Nondiscriminatory Access Requirement Will Promote Facilities-Based Competition Among Telecommunications Providers.

All telecommunications carriers should compete based on their service quality and rates. They should not succeed or fail in the market due to the fact that discrimination tilts the playing field or prevents choice altogether.⁵⁷ Therefore, for purposes of telecommunications competition and maximum tenant choice, the Commission should design rules or recommendations that adhere to and promote the principle of nondiscrimination.⁵⁸

Consistent with a nondiscriminatory access requirement, once an MTE owner or manager grants access to one telecommunications provider, the MTE owner or manager also must permit access to the MTE by competitive telecommunications providers at nondiscriminatory rates, terms, and conditions. In determining rates that are nondiscriminatory and reasonable, the Commission need only look as far as the rates that are currently paid by the ILEC for access to the MTE. In many cases, ILECs do not pay for access, and in those cases, competitors should not be required to pay either. Alternatively, an MTE owner may choose to impose

⁵⁷ See In re Implementation of Section 703(e) of the Telecommunications Act of 1996; Amendment of the Commission's Rules and Policies Governing Pole Attachments, Report and Order, 13 FCC Rcd 6777 at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers."); see also id. at ¶¶ 3-4 (noting that "Section 224 was designed to ensure that utilities' control over poles and rights-of-way did not create a bottleneck that would stifle the growth of cable television" and that the protections of Section 224 were extended to telecommunications carriers in 1996).

⁵⁸ Governance by these principles would be consistent with the goal behind the 1996 Act to "open[] all telecommunications markets to competition." S. Conf. Rep. No. 104-230, at 1 (1996).

nondiscriminatory fees on both the ILEC and the CLEC. If an ILEC refuses to pay access rates, the MTE owner may seek payment through traditional means. The fact that an ILEC may be the "carrier of last resort" for an MTE does not excuse the ILEC from its obligation to pay nondiscriminatory access fees.

Moreover, access to the MTE should be provided on a technology neutral basis. As the Commission acknowledged in the Notice, "competitive providers must be free to provide services in the manner that will enable them most efficiently to offer the services, or combinations of services, that consumers desire Achieving this functionality and flexibility may involve the use of a variety of transmission technologies."⁵⁹ Competitive services are and will continue to be offered using a variety of technologies. All technologies must be accommodated, thereby encouraging the development of alternative communications systems and allowing for flexibility. For fixed wireless carriers who use an antenna on an MTE's rooftop to serve their consumers in that building, rooftop access is necessary. For other technologies, some other type of access may be necessary. Therefore, in the implementation of its nondiscriminatory access requirements, the Commission must ensure that the requirements are technologically neutral in allowing carriers to obtain the access they need to provide their services to consumers.

All consumers should receive the benefits of competition; the nondiscriminatory access requirement should apply to both commercial and residential MTEs. Moreover, exclusive access agreements should be prohibited. Exclusivity contravenes the choice that tenants should have under the 1996 Act and restricts what could otherwise be a competitive market for telecommunications services. In fact, Congressman Markey noted during the May 13, 1999

⁵⁹ Notice, at ¶ 25.

hearing that exclusivity does not allow consumers to enjoy innovation and change because the marketplace is not allowed to work.⁶⁰

Opponents of nondiscriminatory access claim that exclusivity promotes competition by allowing one competitor a foothold in the market. To the contrary, exclusivity typically promotes the incumbent provider's entrenched position and prevents carriers from competing on the basis of service, price, and quality. In essence, the ILECs have de facto exclusive contracts in virtually all MTEs nationwide. The promotion of true competition in MTEs occurs only by permitting every telecommunications carrier the opportunity to offer service to tenants. For this reason, the Commission should reject claims from competitive carriers that exclusives or preferred provider agreements promote competition, and the Commission must prohibit MTE owners from granting exclusive telecommunications carrier access to a building. The Commission must also, at the request of the MTE owner, a telecommunications carrier, or a tenant within the MTE, require the reformation of long-term contracts and the elimination of exclusivity provisions in telecommunications contracts.⁶¹

⁶⁰ Hearing, at 73.

⁶¹ See Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501 (D.C. Cir. 1987)("[T]he Commission has the power to . . . modify other provisions of private contracts when necessary to serve the public interest."); see also In re Expanded Interconnection With Local Telephone Company Facilities; Amendment of the Part 69 Allocation of General Support Facility Costs, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 at ¶ 201 (1992)("The existence of certain long-term access arrangements also raises potential anticompetitive concerns since they tend to 'lock up' the access market, and prevent customers from obtaining the benefits of the new, more competitive interstate access environment. To address this, we conclude that certain LEC customers with long-term access arrangements should be permitted to take a 'fresh look' to determine if they wish to avail themselves of a competitive alternative."), vacated on other grounds and remanded for further proceedings sub nom., Bell Atlantic Tel. Cos. v. FCC, 24 F.3d 1441 (1994); see also Competition in the Interstate Marketplace, Memorandum Opinion and

In addition, the Commission must require MTE owners to permit carriers to install their facilities in an MTE prior to obtaining customers within the MTE. Otherwise, the delays involved in providing service caused by the need to install facilities will operate as a strong disincentive to choosing a competitive provider of telecommunications service and will cause needless delay in the time that a customer can expect to receive service. Moreover, under no circumstances should an MTE owner or manager be permitted to penalize or charge a tenant for requesting or receiving access to the service of that tenant's telecommunications carrier of choice.

Some MTE owners have expressed concern that a nondiscriminatory access requirement would eliminate the MTE owners' control of access to the building. However, a nondiscriminatory access requirement would not replace an access agreement that is negotiated between the MTE owner and competitor. Rather, a nondiscriminatory requirement simply would mandate that MTE owners must negotiate such access agreements with competitors on a nondiscriminatory basis. In other words, an MTE owner or manager still would need to negotiate an access agreement with each telecommunications carrier that requests access; however, the terms of such access would be provided on a nondiscriminatory basis per FCC regulation.⁶² Consequently, MTE owners still would be able to negotiate the terms and conditions -- on a nondiscriminatory basis -- by which competitors gain access. This would allow an MTE owner

Order on Reconsideration, 7 FCC Rcd 2677, 2681-82 (1992)(fresh look for 800 bundling and interexchange offerings).

⁶² Commenters assert that the terms and conditions of access agreements that were established when incumbents had a monopoly should not apply in a competitive marketplace. See, e.g., Letter from Wallick Properties, Inc. to Magalie Roman Salas, Secretary of the FCC, at 2 (filed Aug. 2, 1999). In effect, these commenters are asserting that MTE owners should be permitted to exercise their market power and extract monopoly rents from competitors. The Commission should reject this argument outright as contrary to the 1996 Act and the promotion of a competitive marketplace.